APPEAL NO. 032366
FILED OCTOBER 29, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on August 6, 2003. The hearing officer resolved the disputed issues by deciding that the appellant (claimant) reached maximum medical improvement (MMI) on April 28, 2000, with an impairment rating (IR) of 10%. The claimant appealed, disputing the IR. The respondent (carrier) responded, urging affirmance.

DECISION

Reversed and remanded.

It is undisputed that the claimant sustained a compensable injury to his low back on _____. The parties stipulated that the statutory date of MMI is April 28, 2000. The claimant testified and the hearing officer found that the claimant had spinal surgery in May of 2000 and a second spinal surgery in March of 2002. The designated doctor, Dr. M based on an examination that was conducted on November 26, 2002, certified that the claimant reached statutory MMI on April 28, 2000, with a 7% IR. Dr. M amended his report after responding to a letter of clarification sent by the Texas Workers' Compensation Commission (Commission), noting that the claimant had been approved for surgery prior to the date of statutory MMI and the calculation of impairment should consider that procedure. Dr. M subsequently assessed an IR of 10%. In both his initial certification as well as his amended certification, Dr. M noted that impairment would be assessed considering the date of statutory MMI.

Section 408.125(e) provides that if the designated doctor is chosen by the Commission, the report of the designated doctor shall have presumptive weight, and the Commission shall base the IR on that report unless the great weight of the other medical evidence is to the contrary. Pursuant to Rule 130.6(i), the designated doctor's response to a Commission request for clarification is also considered to have presumptive weight as it is part of the designated doctor's opinion. See also Texas Workers' Compensation Commission Appeal No. 013042-s, decided January 17, 2002. We have held that the designated doctor's report should not be rejected absent a substantial basis for doing so. Texas Workers' Compensation Commission Appeal No. 960897, decided June 28, 1996. The hearing officer determined that the great weight of the other medical evidence is not contrary to the designated doctor's report.

In the instant case, the designated doctor had not been selected as of the date of statutory MMI. The assignment of an IR for a compensable injury must be based on the employee's medical record and the certifying examination. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE §130.1(c)(3). (Rule 130.1(c)(3)). In previous cases where the IR has been assessed using Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association

(AMA Guides), we have rejected the motion that the IR should be a "snapshot" of the claimant's condition on the date of MMI. Texas Workers' Compensation Commission Appeal No. 030723, decided May 9, 2003. The letter requesting clarification may have given Dr. M the impression that he could only consider surgery if it was under active consideration at the time of statutory MMI. In the past, we have held that it is inappropriate for a designated doctor to amend a certification after statutory MMI, if surgery was not under active consideration at the time of statutory MMI. Texas Workers' Compensation Commission Appeal No. 002929-s, decided January 23, 2001; Texas Workers' Compensation Commission Appeal No. 992951, decided February 14, 2000; Texas Workers' Compensation Commission Appeal No. 991081, decided July 8, 1999; and Texas Workers' Compensation Commission Appeal No. 990833, decided June 7, 1999. However, in 3rd edition AMA Guides cases decided after the adoption of Rule 130.6(i), which became effective January 2, 2002, the Appeals Panel has held that the fact that the spinal surgeries occurred after statutory MMI does not automatically mean that they cannot ever be considered in determining the IR. We do not hold that spinal surgeries after statutory MMI must always be considered in all cases. However, in this case, the key factor is that the claimant was first examined by the designated doctor after statutory MMI. *See* Appeal No. 013042-s supra, Texas Workers' Compensation Commission Appeal No. 022618, decided November 27, 2002; and Texas Workers' Compensation Commission Appeal No. 030852, decided May 22, 2003.

Given the particular facts of this case, we reverse the hearing officer's determination that the "determination of the designated doctor is entitled to presumptive weight" and remand the case to the hearing officer to seek additional clarification from the designated doctor with instruction to rate the claimant as of the day he was first examined by the designated doctor and provide an IR report in accordance with the AMA Guides. We note that Table 49 requires the addition of 1% per level in those instances where there were multiple operative levels, with or without residual symptomatology. The hearing officer should provide the parties with a copy of any amended report of the designated doctor and allow the parties an opportunity to respond to any such report. After a response is obtained from the designated doctor, the hearing officer should reconsider the IR issue.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Commission's Division of Hearings, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays, Sundays, and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

The true corporate name of the insurance carrier is **STATE OFFICE OF RISK MANAGEMENT (a self-insured governmental entity)** and the name and address of its registered agent for service of process is

For service in person the address is:

RON JOSSELET, EXECUTIVE DIRECTOR
STATE OFFICE OF RISK MANAGEMENT
300 W. 15TH STREET
WILLIAM P. CLEMENTS, JR. STATE OFFICE BUILDING, 6TH FLOOR
AUSTIN, TEXAS 78701.

For service by mail the address is:

RON JOSSELET, EXECUTIVE DIRECTOR
STATE OFFICE OF RISK MANAGEMENT
P.O. BOX 13777
AUSTIN, TEXAS 78711-3777.

_____
Margaret L. Turner
Appeals Judge

CONCUR:

_____
Judy L. S. Barnes
Appeals Judge

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Chris Cowan
Appeals Judge